TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 825

ROSCOE IRWIN, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE FOURTEENTH DISTRICT OF NEW YORK, PETITIONER

vs.

E. PALMER GAVIT

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 18, 1925.
CERTIORARI GRANTED APRIL 14, 1925.

(30198)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 325

ROSCOE IRWIN, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE FOURTEENTH DISTRICT OF NEW YORK, PETITIONER

vs.

E. PALMER GAVIT

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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J43038

1 In United States District Court

For the Northern District of New York

E. PALMER GAVIT, PLAINTIFF
against
ROSCOE IRWIN, COLLECTOR OF INTERNAL REVENUE FOR the fourteenth district of New York, defendant } No. 418

Summons

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the honorable George W. Ray, judge of the said court, at the city of Utica, in the said Northern District of New York, the 4th day of June, in the year of our Lord one thousand nine hundred and seventeen.

[SEAL.] W. S. DOOLITTLE, *Clerk.*

NEILE F. TOWNER,
Plaintiff's Attorney.

Office and post office address, 13 North Pearl Street, Albany, New York.

2 In United States District Court

(Title omitted.)

Bill of complaint

The plaintiff for complaint herein alleges:

FOR A FIRST CAUSE OF ACTION

First. That at all the times hereinafter mentioned, plaintiff was and now is a citizen of the United States of America and a resident of the city of Albany, county of Albany, Northern District of New York.

Second. That at all the times hereinafter mentioned the defendant was and now is collector of internal revenue for the fourteenth district of New York and resided, and now resides, in said Northern District of New York.

Third. That on or about June 1st, 1915, plaintiff received from the defendant a notice of and a demand for a tax claimed to be

assessed upon his individual income for the period ending December 31st, 1913, demanding payment of said tax, together with a penalty imposed thereon on or before June 11th, 1915. That said notice further provided that if said tax was not in the hands of
3 defendant for deposit before the close of business on said date, it would be his duty, under the law, to collect the same, together with five per centum additional and interest at one per centum per month until paid. That said tax amounted to one hundred ninety-six dollars and fifty-eight cents ($196.58), and said penalty amounted to ninety-eight dollars and twenty-nine cents ($98.29). That a copy of said notice is hereto annexed, marked "Schedule A," and made a part hereof.

Fourth. Upon information and belief, that said income tax was based upon the return for the period ending December 31st, 1913, made and filed by plaintiff with the defendant on or about April 10th, 1915.

Fifth. That in filing his said return for the period ending December 31st, 1913, plaintiff made a specific claim that all sums received by him, which were designated in said return, from the estate of Anthony N. Brady, was a bequest and not income and not taxable, and duly protested against any tax being levied thereon. That the original return filed with defendant is hereby made a part hereof as though the same was set forth in full herein.

Sixth. That under the will of Anthony N. Brady, deceased, admitted to probate by the Surrogate of Albany County on August 12th, 1913, plaintiff received a specific bequest based on a certain fixed proportion of said estate and payable during a certain fixed period. That a copy of the portion of said will of Anthony N. Brady which contains the aforesaid bequest to plaintiff is hereto annexed, marked "Schedule B," and made a part hereof.

4 Seventh. That the amount received by plaintiff from the estate of Anthony N. Brady during the period ending December 31st, 1913, was a bequest and not income and not taxable as such within the provisions of the act of Congress, approved October 3rd, 1913.

Eighth. That deducting from plaintiff's income said amount received by plaintiff from the estate of Anthony N. Brady, as set forth in plaintiff's said income tax return for the period ending December 31st, 1913, referred to in paragraph or subdivision numbered "Fourth" of this first cause of action of the complaint, the balance of plaintiff's income was not taxable within the provisions of the said act of Congress, approved October 3rd, 1913.

Ninth. That on June 11th, 1915, plaintiff paid to defendant said tax amounting to one hundred ninety-six dollars and fifty-eight cents ($196.58) under protest and by compulsion and under duress, for the reason that in case of default in the payment thereof defendant threatened to enforce collection and impose a further penalty and that plaintiff had no means of immediate relief other than such payment, and plaintiff specifically notified defendant that he

made such payment by compulsion and under duress and without waiver of his rights to recover same, and further specifically objected to the assessment of said tax against him and the imposition of said penalty and protested against the payment of same for the reason that said tax was erroneously illegally and unlawfully assessed against him, in that said tax was based upon sums received by plaintiff during said period ending December 31st, 1913,
5 from the estate of Anthony N. Brady, which was a bequest and not income and therefore not taxable, that said tax was not a proper tax upon his income and was contrary to the letter and spirit of said act of Congress, approved October 3rd, 1913. That a copy of the written protest filed with the defendant at the time of making said payment is hereby referred to and made a part hereof as though the same was set forth in full herein.

Tenth. That at the time that said tax was paid plaintiff appealed to the United States Commissioner of Internal Revenue for the remission of said penalty imposed upon him, upon the ground that the amount received by him from the estate of Anthony N. Brady was a bequest and therefore not taxable, and for that reason no return of his income for the period ending December 31st, 1913, was made at the time the said return was due, namely, on or before March 1st, 1914. That as soon as plaintiff was advised that the said sum would not be regarded as income, he immediately made a return for the period ending December 31st, 1913, although he still claimed that such sum was a bequest and not taxable, and protested against any tax being levied thereon.

Eleventh. That thereafter said claim for the remission of said penalty was disallowed by said United States Commissioner of Internal Revenue, and on June 29th, 1915, plaintiff paid to defendant, under protest, said penalty of ninety-eight dollars and twenty-five cents ($98.25).

Twelfth. That on or about November 10th, 1916, and within two years after the collection by defendant from plaintiff of said tax and penalty, amounting to two hundred ninety-four dollars
6 and eighty-seven cents ($294.87), as aforesaid, plaintiff appealed to the United States Commissioner of Internal Revenue to refund said tax and penalty upon the ground that said tax was erroneously, wrongfully, and unlawfully assessed against him, in that said tax was based upon sums received by him during said year 1913 from the estate of Anthony N. Brady which was a bequest and not income, and, therefore, not taxable, and that said tax was not a tax upon his net income and was contrary to and against the letter and spirit of the act of October 3rd, 1913. That said claim for refund, duly filed, is hereby referred to and made a part hereof as though the same was set forth in full herein.

Thirteenth. Upon information and belief, that thereafter and on or about April 14th, 1917, said claim for refund was rejected by the United States Commissioner of Internal Revenue and notice of said rejection was given to plaintiff by defendant.

Fourteenth. That by reason of the foregoing there is lawfully due to plaintiff from the defendant the sum of two hundred ninety-four dollars and eighty-seven cents ($294.87), with interest on one hundred ninety-six dollars and fifty-eight cents ($198.58) from June 11th, 1915, and on ninety-eight dollars and twenty-nine cents ($98.29) from June 29th, 1915.

FOR A SECOND CAUSE OF ACTION

First. Repeats, realleges, and makes a part hereof all the allegations contained in paragraphs or subdivisions numbered "First" and "Second" of the first cause of action of the complaint herein.

7 Second. That on or about May 29th, 1916, plaintiff received from the defendant a notice of and a demand for an additional tax claimed to be assessed upon his individual income for the period ending December 31st, 1913, demanding payment of said additional tax, together with a penalty imposed thereon, on or before June 8th, 1916. That said notice further provided that if said additional tax was not in the hands of defendant for deposit before the close of business on said date, it would be his duty, under the law, to collect the same, together with five per centum additional and interest at one per centum per month until paid. That said tax amounted to two thousand ninety-seven dollars and eighty-two cents ($2,097.82), and said penalty to one thousand forty-eight dollars and ninety-one cents ($1,048.91). That a copy of said notice is hereto annexed, marked "Schedule C" and made a part hereof.

Third. Upon information and belief, that said additional income tax was based upon the amended return for the period ending December 31st, 1913, made and filed by plaintiff with the defendant on or about April 13th, 1916.

Fourth. That in filing his said amended return for the period ending December 31st, 1913, plaintiff made a specific claim that all sums received by him, which were designated in said amended return, from the estate of Anthony N. Brady, was a bequest and not income and not taxable, and duly protested against any tax being levied thereon. That the original amended return filed with defendant is hereby made a part hereof as though the same was set forth in full herein.

8 Fifth. That under the will of Anthony N. Brady, admitted to probate by the surrogate of Albany County on August 12th, 1913, plaintiff received a specific bequest based on a certain fixed proportion of said estate and payable during a certain fixed period. That a copy of the portion of said will of Anthony N. Brady which contains the aforesaid bequest to plaintiff is hereto annexed, marked "Schedule B," and made a part hereof.

Sixth. That the amount received or receivable by plaintiff from the estate of Anthony N. Brady during the period ending December

31st, 1913, was a bequest and not income and not taxable as such within the provisions of the act of Congress, approved October 3rd, 1913.

Seventh. That deducting from plaintiff's income said amount received or receivable by plaintiff from the estate of Anthony N. Brady, as set forth in plaintiff's said amended income tax return for the period ending December 31st, 1913, referred to in paragraph or subdivision numbered "Third" of this second cause of action of the complaint, the balance of plaintiff's income was not taxable within the provisions of the said act of Congress, approved October 3rd, 1913.

Eighth. That on June 8th, 1916, plaintiff paid to defendant said tax amounting to two thousand ninety-seven dollars and eighty-two cents ($2,097.82) under protest and by compulsion and under duress, for the reason that in case of default in the payment thereof defendant threatened to enforce collection and impose a further penalty and that plaintiff had no means of immediate relief other than such payment, and plaintiff specifically notified defendant that
9 he made such payment by compulsion and under duress and without waiver of his right to recover same, and further specifically objected to the assessment of said tax against him and the imposition of said penalty and protested against the payment of same for the reason that said tax was erroneously, illegally, and unlawfully assessed against him, in that said tax was based upon sums received by plaintiff during said period ending December 31st, 1913, from the estate of Anthony N. Brady, which was a bequest and not income and therefore not taxable, that said tax was not a proper tax upon his income and was contrary to the letter and spirit of said act of Congress, approved October 3rd, 1913, and that the additional and super tax was objectionable on the ground that the same was unconstitutional and void. That a copy of the written protest filed with the defendant at the time of making said payment is hereby referred to and made a part hereof as though the same was set forth in full herein.

Ninth. That at the time said additional tax was paid plaintiff appealed to the United States Commissioner of Internal Revenue for the remission of said penalty imposed upon him, upon the ground that the amount received by him from the estate of Anthony N. Brady was a bequest and, therefore, not taxable, and for that reason no return of his income for the period ending December 31st, 1913, was made at the time the said return was due, namely, on or before March 1st, 1914. That plaintiff thereafter filed a return and that by ruling of the United States Internal Revenue on March 16th, 1916, he was advised that he must file an
10 amended return, including not only the amounts received by him from the estate of Anthony N. Brady, but the amounts receivable, and he filed such amended return without prejudice to the demands theretofore or thereafter made by plaintiff to recover

the entire amount of said tax, by reason of the fact that the amount received by him from the estate of Anthony N. Brady is a bequest and not income.

Tenth. That thereafter said claim for the remission of said penalty was disallowed by said United States Commissioner of Internal Revenue, and after notice and demand on August 16th, 1916, plaintiff paid to defendant, under protest, said penalty of one thousand forty-eight dollars and ninety-one cents ($1,048.91), together with twenty-six dollars and twenty-two cents ($26.22), interest thereon. That a copy of the written protest filed with defendant at the time of making said payment is hereby referred to and made a part hereof as though the same was set forth in full herein.

Eleventh. That on or about November 10th, 1916, and within two years after the collection by defendant from plaintiff of said additional tax, penalty, and interest, amounting to three thousand one hundred seventy-two dollars and ninety-five cents ($3,172.95), as aforesaid, plaintiff appealed to the United States Commissioner of Internal Revenue to refund said additional tax, penalty, and interest, upon the ground that said tax was erroneously, wrongfully, and unlawfully assessed against him, in that said tax was based upon sums received or receivable by him during said year 1913, from the estate of Anthony N. Brady, which was a bequest and not income, and therefore not taxable, and that said tax was
11 not a tax upon his net income, but was contrary to *to* and against the letter and spirit of the act of Congress approved October 3rd, 1913, and that all additional and super tax was unconstitutional and void. That said claim for refund, duly filed by plaintiff, is hereby referred to and made a part hereof as though the same was set forth in full herein.

Twelfth. Upon information and belief, that thereafter and on or about April 14th, 1917, said claim for refund was rejected by the United States Commissioner of Internal Revenue and notice of said rejection was given to plaintiff by defendant.

Thirteenth. That by reason of the foregoing there is lawfully due to plaintiff from defendant the sum of three thousand one hundred seventy-two dollars and ninety-five cents, ($3,172.95), with interest on two thousand ninety-seven dollars and eighty-two cents ($2,097.82) from June 8th, 1916, and on one thousand seventy-five dollars and thirteen cents ($1,075.13) from August 16th, 1916.

FOR A THIRD CAUSE OF ACTION

First. Repeats, realleges, and makes a part hereof all the allegations contained in paragraphs or subdivisions numbered "First" and "Second" of the first cause of action of the complaint herein.

Second. That on or about June 1st, 1915, plaintiff received from the defendant a notice of assessment of special excise and income tax, which was a tax, as plaintiff is informed and believes, claimed

to be assessed upon his individual income for the year ending
12 December 31st, 1914. That said notice provided that the tax was due and payable to the defendant on or before June 30th, 1915, and that to avoid penalty and interest, taxes must be paid to defendant in such a manner as would enable him to place same with his depository not later than the close of business of the date before mentioned. That said tax amounted to four thousand one hundred fifty-one dollars and sixty-one cents, ($4,151.61). That a copy of said notice is hereto annexed, marked "Schedule D," and made a part hereof.

Third. Upon information and belief, that said income tax was based upon the supplemental return for the year ending December 31st, 1914, made and filed by plaintiff with the defendant on or about April 10th, 1915.

Fourth. That in filing his said supplemental return for the period ending December 31st, 1914, plaintiff made a specific claim that all sums received by him, which were designated in said supplemental return, from the estate of Anthony N. Brady, was a bequest and not income and not taxable, and duly protested against any tax being levied thereon. That the original supplemental return filed with defendant is hereby made a part hereof as though the same was set forth in full herein.

Fifth. That under the will of Anthony N. Brady, deceased, admitted to probate by the surrogate of Albany County on August 12th, 1913, plaintiff received a specific bequest based on a certain fixed proportion of said estate and payable during a certain fixed period. That a copy of the portion of said will of Anthony N. Brady which contains the aforesaid bequest to plaintiff is hereto annexed, marked "Schedule B," and made a part hereof.

13 Sixth. That the amount received by plaintiff from the estate of Anthony N. Brady during the year ending December 31st, 1914, was a bequest and not income and not taxable as such within the provisions of the act of Congress, approved October 3rd, 1913.

Seventh. That deducting from plaintiff's income said amount received by plaintiff from the estate of Anthony N. Brady, as set forth in plaintiff's said supplemental income tax return for the year ending December 31st, 1914, referred to in paragraph or subdivision numbered "Third" of this third cause of action of the complaint, the balance of plaintiff's income was not taxable within the provisions of the said act of Congress, approved October 3rd, 1913.

Eighth. That on June 30th, 1915, plaintiff paid to defendant said tax, amounting to four thousand one hundred fifty-one dollars and sixteen cents ($4,151.16), under protest and by compulsion and under duress, for the reason that in case of default in the payment thereof defendant threatened to enforce collection and impose a penalty, and that plaintiff had no means of immediate relief other than such payment, and plaintiff specifically notified defendant that

he made such payment by compulsion and under duress and without waiver of his rights to recover same, and further specifically objected to the assessment of said tax against him and protested against the payment of same for the reason that said tax was erroneously, illegally, and unlawfully assessed against him, in that said tax was based upon sums received by plaintiff during
14 said year ending December 31st, 1914, from the estate of Anthony N. Brady, which was a bequest and not income, and therefore not taxable; that said tax was not a proper tax upon his income and was contrary to the letter and spirit of said act of Congress approved October 3rd, 1913. That a copy of the written protest filed with the defendant at the time of making said payment is hereby referred to and made a part hereof as though the same was set forth in full herein.

Ninth. That on or about November 10th, 1916, and within two years after the collection by defendant from plaintiff of said tax, amounting to four thousand one hundred fifty-one dollars and sixteen cents ($4,151.16), as aforesaid, plaintiff appealed to the United States Commissioner of Internal Revenue to refund said tax upon the ground that said tax was erroneously, wrongfully, and unlawfully asses'ed against him, in that said tax was based upon sums received by him during said year 1914, from the estate of Anthony N. Brady, which was a bequest and not income, and therefore not taxable, and that said tax was not a tax upon his net income and was contrary to and against the letter and spirit of the act of October 3rd, 1913, that an additional and super tax was unconstitutional and void. That said claim for refund, duly filed, is hereby referred to and made a part hereof as though the same was set forth in full herein.

Tenth. Upon information and belief, that thereafter and on or about April 14th, 1917, said claim for refund was rejected by the United States Commissioner of Internal Revenue and notice of said rejection was given to plaintiff by defendant.

15 Eleventh. That by reason of the foregoing there is lawfully due to plaintiff from the defendant the sum of four thousand one hundred fifty-one dollars and sixteen cents ($4,151.16).

FOR A FOURTH CAUSE OF ACTION

First. Repeats, realleges, and makes a part hereof all the allegations contained in paragraphs or subdivisions numbered "First" and "Second" of the first cause of action of the complaint herein.

Second. That on or about May 29th, 1916, plaintiff received from the defendant a notice of and a demand for an additional tax claimed to be assessed upon his individual income for the period ending December 31st, 1914, demanding payment of said additional tax on or before June 8th, 1916. That said notice further provided that if said additional tax was not in the hands of defendant

for deposit before the close of business on said date, it would be his duty, under the law, to collect the same, together with five per centum additional and interest at one per centum per month until paid. That said tax amounted to nine thousand three hundred eleven dollars and seventeen cents ($9,311.17). That a copy of said notice is hereby annexed, marked "Schedule E," and made a part hereof.

Third. Upon information and belief that said additional income tax was based upon the amended return for the year ending December 31st, 1914, made and filed by plaintiff with the defendant on or about April 13th, 1916.

Fourth. That in filing his said amended return for the
16 year ending December 31st, 1914, plaintiff made a specific claim that all sums received by him, which were designated in said amended return, from the estate of Anthony N. Brady, was a bequest and not income and not taxable, and duly protested against any tax being levied thereon. That the original amended return filed with defendant is hereby made a part hereof as though the same was set forth in full herein.

Fifth. That under the will of Anthony N. Brady, admitted to probate by the surrogate of Albany County on August 12th, 1913, plaintiff received a specific bequest based on a certain fixed proportion of said estate and payable during a certain fixed period. That a copy of the portion of said will of Anthony N. Brady which contains the aforesaid bequest to plaintiff is hereto annexed, marked "Schedule B," and made a part hereof.

Sixth. That the amount received or receivable by plaintiff from the estate of Anthony N. Brady during the year ending December 31st, 1914, was a bequest and not income and not taxable as such within the provisions of the act of Congress, approved October 3rd, 1913.

Seventh. That deducting from plaintiff's income said amount received or receivable by plaintiff from the estate of Anthony N. Brady, as set forth in plaintiff's said amended income tax return, for the period ending December 31st, 1914, referred to in paragraph or subdivision numbered "Third" of this fourth cause of action of the complaint, the balance of plaintiff's income was not taxable within the provisions of the said act of Congress, approved October 3rd, 1913.

17 Eighth. That on June 8th, 1916, plaintiff paid to defendant said tax amounting to nine thousand three hundred and eleven dollars and seventeen cents ($9,311.17), under protest and by compulsion and under duress, for the reason that in case of default in the payment thereof defendant threatened to enforce collection and impose a penalty and that plaintiff had no means of immediate relief other than such payment, and plaintiff specifically notified defendant that he made such payment by compulsion and under duress and without waiver of his rights to recover same, and further specifically objected to the assessment of said tax against him and pro-

tested against the payment of same for the reason that said tax was erroneously, illegally, and unlawfully assessed against him, in that said tax was based upon sums received by plaintiff during said year ending December 31st, 1914, from the estate of Anthony N. Brady, which was a bequest and not income and therefore not taxable, that said tax was not a proper tax upon his income and was contrary to the letter and spirit of said act of Congress, approved October 3rd, 1913, and that the additional and super tax was objectionable on the ground that the same was unconstitutional and void. That a copy of the written protest filed with the defendant at the time of making said payment is hereby referred to and made a part hereof as though the same was set forth in full herein.

Ninth. That on or about November 10th, 1916, and within two years after the collection by defendant from plaintiff of said additional tax amounting to nine thousand three hundred and
18 eleven dollars and seventeen cents ($9,311.17), as aforesaid, plaintiff appealed to the United States Commissioner of Internal Revenue to refund said additional tax, upon the ground that said tax was erroneously, wrongfully, and unlawfully assessed against him, in that said tax was based upon sums received or receivable by him during said year 1914, from the estate of Anthony N. Brady, which was a bequest and not income, and, therefore, not taxable, and that said tax was not a tax upon his net income, but was contrary to and against the letter and spirit of the act of Congress, approved October 3rd, 1913, and that all additional and super tax was unconstitutional and void. That said claim for refund, duly filed by plaintiff, is hereby referred to and made a part hereof as though the same was set forth in full herein.

Tenth. Upon information and belief, that thereafter and on or about April 14th, 1917, said claim for refund was rejected by the United States Commissioner of Internal Revenue and notice of said rejection was given to plaintiff by defendant.

Eleventh. That by reason of the foregoing there is lawfully due to plaintiff from defendant the sum of nine thousand three hundred and eleven dollars and seventeen cents ($9,311.17).

FOR A FIFTH CAUSE OF ACTION

First. Repeats, realleges, and makes a part hereof all the allegations contained in paragraphs or subdivisions numbered "First" and "Second" of the first cause of action of the complaint herein.

Second. That on or about May 29th, 1916, plaintiff received
19 from defendant notice of assessment of special excise and income tax, which was a tax, as plaintiff is informed and believes, claimed to be assessed upon his individual income for the year ending December 31st, 1915. That said notice provided that the tax was due and payable to the defendant on or before June 30th, 1916, and that to avoid penalty and interest, taxes must be paid to defendant in such a manner as would enable him to place same with

his depository not later than the close of business of the date before mentioned. That a copy of said notice is hereto annexed marked "Schedule F" and made a part hereof. That said tax amounted to $4,672.01.

Third. Upon information and belief, that said income tax was based upon the return for the year ending December 31, 1915, made and filed by plaintiff with the defendant on or about March 30, 1916.

Fourth. That in filing his said return for the year ending December 31, 1915, plaintiff made a specific claim that all sums received by him, which were designated in said amended return, from the estate of Anthony N. Brady, was a bequest and not income and not taxable, and duly protested against any tax being levied thereon. That the original return filed with defendant is hereby made a part hereof as though the same was set forth in full herein.

Fifth. That under the will of Anthony N. Brady, admitted to probate by the surrogate of Albany County on August 12, 1913, plaintiff received a specific bequest based on a certain fixed proportion of said estate and payable during a certain fixed period. That
20 a copy of the portion of said will of Anthony N. Brady which contains the aforesaid bequest to plaintiff is hereto annexed, marked "Schedule B," and made a part hereof.

Sixth. That the amount received or receivable by plaintiff from the estate of Anthony N. Brady during the year ending December 31, 1915, was a bequest and not income and not taxable as such within the provisions of the act of Congress, approved October 3, 1913.

Seventh. That deducting from plaintiff's income said amount received or receivable by plaintiff from the estate of Anthony N. Brady, as set forth in plaintiff's said income tax return, for the period ending December 31, 1915, referred to in paragraph or subdivision numbered "Third" of this fifth cause of action of the complaint, the balance of plaintiff's income was not taxable within the provisions of the said act of Congress, approved October 3, 1913.

Eighth. That on June 30, 1916, plaintiff paid to defendant said tax amounting to four thousand six hundred seventy-two dollars and one cent ($4,672.01), under protest and by compulsion and under duress, for the reason that in case of default in the payment thereof defendant threatened to enforce collection and impose a penalty and that plaintiff had no means of immediate relief other than such payment, and plaintiff specifically notified defendant that he made such payment by compulsion and under duress and without waiver of his rights to recover same, and further specifically objected to the assessment of said tax against him and protested against the payment of same for the reason that said tax was erroneously,
21 illegally, and unlawfully assessed against him, in that said tax was based upon sums received by plaintiff during said year ending December 31, 1915, from the estate of Anthony N. Brady, which was a bequest and not income and therefore not taxable, that

said tax was not a proper tax upon his income and was contrary to the letter and spirit of said act of Congress, approved October 3, 1913, and that the additional and super tax was objectionable on the ground that the same was unconstitutional and void. That a copy of the written protest filed with the defendant at the time of making said payment is hereby referred to and made a part hereof as though the same was set forth in full herein.

Ninth. That on or about November 10th, 1916, and within two years after the collection by defendant from plaintiff of said tax amounting to four thousand six hundred seventy-two dollars and one cent ($4,672.01), as aforesaid, plaintiff appeared to the United States Commissioner of Inter'al Revenue to refund said tax, upon the ground that said tax was erroneously, wrongfully, and unlawfully assessed against him, in that said tax was based upon sums received or receivable by him during said year 1915, from the estate of Anthony N. Brady, which was a bequest and not income and, therefore, not taxable, and that said tax was not a tax upon his net income, but was contrary to and against the letter and spirit of the act of Congress, approved October 3rd, 1913, and that all additional and super tax was unconstitutional and void. That said claim for refund, duly filed by plaintiff, is hereby referred to and made a part hereof as though the same was set forth in full herein.

22 Tenth. Upon information and belief, that thereafter and on or about April 14th, 1917, said claim for refund was rejected by the United States Commissioner of Internal Revenue and notice of said rejection was given to plaintiff by defendant.

Eleventh. That by reason of the foregoing there is lawfully due to plaintiff from defendant the sum of four thousand six hundred seventy-two dollars and one cent ($4,672.01), with interest thereon from June 30th, 1916.

Wherefore plaintiff demands judgment against the defendant in the sum of twenty-one thousand six hundred and two dollars and sixteen cents ($21,602.16), with interest on one hundred ninety-six dollars and fifty-eight cents ($196.58) from June 11th, 1915, on ninety-eight dollars and twenty-nine cents ($98.29) from June 29th, 1915, on four thousand one hundred fifty-one dollars and sixteen cents ($4,151.16) from June 30th, 1915, on eleven thousand four hundred eight dollars and ninety-nine cents ($11,408.99) from June 8th, 1916, on four thousand six hundred seventy-two dollars and one cent ($4,672.01) from June 30th, 1916, and on one thousand seventy-five dollars and thirteen cents ($1,075.13) from August 16th, 1916, besides costs.

NEILE F. TOWNER,
Attorney for Plaintiff.

Office and post-office address, No. 13 North Pearl Street, Albany, New York.

23 (Jurat showing the foregoing was duly sworn to by E. Palmer Gavit. Omitted in printing.)

Exhibit to complaint

SCHEDULE "A"

[Front]

Tax $196.58. 50% penalty $98.29. Form 17. United States Internal Revenue. Notice of and demand for tax assessed. List for month of Apr., 1915.

24 52–8 Division.

UNITED STATES INTERNAL REVENUE,
OFFICE OF THE COLLECTOR,
14TH DISTRICT OF NEW YORK,
At Albany, June 1, 1915.

To E. PALMER GAVIT,
Thurlow Terrace, Albany.

You are hereby notified that a tax, under the internal revenue laws of the United States, amounting to $294.87, the same being a tax upon individual income tax for the period ending Dec. 31, 1913, has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection.

Demand is here made for this tax, which is due and payable, to the person designated below on or before June 11, 1915, such payment to be made in the manner set forth on the reverse side of this notice and demand. If this tax is not in my hands for deposit before the close of business of the day above specified it will be my duty, under the law, to collect the same, together with 5 per centum additional, and interest at 1 per centum per month until paid.

Payment may be made to at Albany, or to Roscoe Irwin, collector.

Uncertified checks not accepted. Carefully note instructions on the back of this notice.

25

[Back]

To avoid penalty and interest, taxes must be paid to the collector or person designated by him in such a manner as will enable him to place the same with his depositary and receive a certificate of deposit therefor not later than the close of business of the date mentioned in the body of this notice.

Payment may be made in currency, post office money order, or certified check on a National or State bank or trust company, providing such checks can be collected without cost to the Government. It should be borne in mind by taxpayers that the date when such checks may be cashed and the money deposited is the date of payment, and allowance should be made accordingly.

Collectors cannot receive in payment of taxes uncertified checks, personal checks, drafts, or vouchers, and all indorsements by collec-

tors on certified checks are made without recourse. Money orders and certified checks must be made payable to the collector of internal revenue.

SCHEDULE "B"

Seventh. All the rest, residue, and remainder of the real and personal property of which I may die seized and possessed, I direct my executors and trustees to divide into six equal parts and I give, devise, and bequeath the same as follows:

* * * * * * *

One part, to my executors and trustees, in trust nevertheless for the following uses and purposes, to wit: To collect and receive the rents, income, and profits thereof and after paying all
26 necessary expenses to dispose of the net rents, income, and profits thereof as follows: I direct my executors and trustees to apply so much of said net rents, income, and profits as they in the exercise of their absolute discretion, shall deem proper for the maintenance, education, and support during her minority, of my granddaughter, Marcia Ann Gavit, and I direct my executors and trustees in fixing the amount of said allowance to consider the station in life of my said granddaughter, my desire being that she shall be amply and liberally provided for in every way. All income to be applied to the maintenance, education, and support of my said granddaughter may be either so applied by my executors and trustees directly, or may in their discretion be paid by them to the guardian of the person of said minor, and the receipt of such guardian shall be full and complete discharge to them for all moneys so paid by them to such guardian. The balance of said net rents, income, and profits shall be divided into two equal parts: One of the said parts shall be paid to my son-in-law, Erastus Palmer Gavit, in equal quarter yearly payments during his life. The other moiety shall be accumulated for the benefit of my said granddaughter. Upon the death of my said granddaughter before she attains her majority, whether her father be then living, or not, I give, devise, and bequeath the capital of said trust estate to her issue in equal shares, per stirpes, and if she leaves no issue, whether her father be then living or not, I give, devise, and bequeath said capital to my issue, share and share alike, per stirpes. When my granddaughter attains the age of twenty-one years, whether her father be then living,
27 or not, and whether she then has living issue, or not, I direct that said trust shall cease, and I give, devise, and bequeath the capital of said trust estate to my said granddaughter, her heirs and assigns forever.

SCHEDULE "C"

[Front]

Tax, $2,097.82. 50% penalty, $1,048.91. Amended return. Add. tax only. Notice of and demand for tax assessed.

Form 17. United States Internal Revenue. F. C. Jan 13–16. Uncertified checks not accepted. List for month of Apr., 1916.

54–30 division.

UNITED STATES INTERNAL REVENUE.
OFFICE OF THE COLLECTOR.
14TH DISTRICT OF NEW YORK.
At Albany, May 29th, 1916.

To E. PALMER GAVIT,
Thurlow Terrace, Albany.

You are hereby notified that a tax, under the internal revenue laws of the United States, amounting to $3,146.73, the same being a tax upon individual income tax for the period ending December 31st, 1913, has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection.

Demand is here made for this tax, which is due and payable
28 to the person designated below on or before June 8th, 1916, such payment to be made in the manner set forth on the reverse side of this notice and demand. If this tax is not in my hands for deposit before the close of business of the day above specified it will become my duty, under the law, to collect the same, together with 5 per centum additional, and interest at 1 per centum per month until paid.

Payment to be made to at Albany, or to Roscoe Irwin, collector.

[Back]

To avoid penalty and interest, taxes must be paid to the collector or person designated by him in such a manner as will enable him to place the same with his depositary and receive a certificate of deposit therefor not later than the close of business of the date mentioned in the body of this notice.

Payment may be made in currency, post-office money order, or certified check on a National or State bank or trust company, providing such checks can be collected without cost to the Government. It should be borne in mind by taxpayers that the date when such checks may be cashed and the money deposited is the date of payment, and allowance should be made accordingly.

Collectors can not receive in payment of taxes uncertified checks, personal checks, drafts, or vouchers, and all indorsements by col-

lectors on certified checks are made without recourse. Money orders and certified checks must be made payable to the collector of internal revenue.

29 "SCHEDULE "D"

[Front]

Form 647. United States Internal Revenue. Notice of assessment of special excise and income tax. List for month of April, 1915.

UNITED STATES INTERNAL REVENUE.
OFFICE OF THE COLLECTOR,
14TH DISTRICT OF NEW YORK,
At Albany, June 1, 1915.

To E. PALMER GAVIT,
Thurlow Terrace, Albany:

Individual income tax.

You are hereby notified that {special excise tax / income tax} under the provisions of section {38 of the act of August 5, 1909, / 2 of the act of October 3, 1913,} amounting to $4,151.16, has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection. This tax is due and payable on or before June 30, 1915, to the person designated below in the manner set forth on the reverse side of this notice.

Payment may be made to at Albany, or to Roscoe Irwin, collector.

Uncertified checks not accepted. Bring this notice with you.

30 [Back]

To avoid penalty and interest, taxes must be paid to the collector or person designated by him in such a manner as will enable him to place the same with his depositary and receive a certificate of deposit therefor not later than the close of business of the date mentioned in the body of this notice.

Payment may be made in currency, post-office money order, or certified check on a National or State bank or trust company, providing such checks can be collected without cost to the Government. It should be borne in mind by taxpayers that the date when such checks may be cashed and the money deposited is the date of payment, and allowance should be made accordingly.

Collectors can not receive in payment of taxes uncertified checks, personal checks, drafts, or vouchers, and all indorsements by collectors on certified checks are made without recourse. Money orders and certified checks must be made payable to the collector of internal revenue.

SCHEDULE "E"

[Front]

Original-Amended. Add. tax only. Notice of and demand for tax assessed. Form 17. United States Internal Revenue, F. C. Jan. 13–16.

Uncertified checks not accepted. List for month of Apr., 1916. 52–13 Division.

31

UNITED STATES INTERNAL REVENUE,
OFFICE OF THE COLLECTOR,
14TH DISTRICT OF NEW YORK,
At Albany, May 29th, 1916.

To E. PALMER GAVIT,
Thurlow Terrace, Albany.

You are hereby notified that a tax, under the internal revenue laws of the United States, amounting to $9,311.17, the same being a tax upon individual income tax for the period ending December 31st, 1914, has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection.

Demand is here made for this tax, which is due and payable to the person designated below on or before June 8th, 1916, such payment to be made in the manner set forth on the reverse side of this notice and demand. If this tax is not in my hands for deposit before the close of business of the day above specified it will become my duty, under the law, to collect the same, together with 5 per centum additional, and interest at 1 per centum per month until paid.

Payment may be made to at Albany, or to Roscoe Irwin, collector.

[Back]

To avoid penalty and interest, taxes must be paid to the collector or person designated by him in such a manner as will enable him to place the same with his depositary and receive a certificate
32 of deposit therefor not later than the close of business of the date mentioned in the body of this notice.

Payment may be made in currency, post-office money order, or certified check on a National or State bank or trust company, providing such checks can be collected without cost to the Government. It should be borne in mind by taxpayers that the date when such checks may be cashed and the money deposited is the date of payment, and allowance should be made accordingly.

Collectors can not receive in payment of taxes uncertified checks, personal checks, drafts, or vouchers, and all indorsements by collectors on certified checks are made without recourse. Money orders and certified checks must be made payable to the collector of internal revenue.

SCHEDULE "F"

[Front]

Form 647. Add. tax only. United States Internal Revenue. Notice of assessment of special excise and income tax. List for month of April, 1916.

UNITED STATES INTERNAL REVENUE,
OFFICE OF THE COLLECTOR,
14TH DISTRICT OF NEW YORK.
At Albany, May 29, 1916.

33 To E. PALMER GAVIT,
Thurlow Terrace, Albany.
Individual income tax 16–8.

You are hereby notified that a {special excise tax / income tax} under the provisions section {2 of the act of October 3, 1913, / 38 of the act of August 5, 1909,} amounting to $4,672.01 has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection. This tax is due and payable on or before the June 30th, 1916, to the person designated below in the manner set forth on the reverse side of this notice.

Uncertified checks not accepted. Payment may be made to at Albany, or to Roscoe Irwin, collector. Bring this notice with you.

[Back]

To avoid penalty and interest, taxes must be paid to the collector or person designated by him in such a manner as will enable him to place the same with his depositary and receive a certificate of deposit therefor not later than the close of business of the date mentioned in the body of this notice.

Payment may be made in currency, post-office money order, or certified check on a National or State bank or trust company, providing such checks can be collected without cost to the Gov-
34 ernment. It should be borne in mind by the taxpayers that the date when such checks may be cashed and the money deposited is the date of payment, and allowance should be made accordingly.

Collectors can not receive in payment of taxes uncertified checks, personal checks, drafts or vouchers, and all indorsements by collectors on certified checks are made without recourse. Money orders and certified checks must be made payable to the collector of internal revenue.

In United States District Court

[Title omitted.]

Demurer

The defendant above named hereby demurs to the plaintiff's complaint on the ground that the said complaint failed to state facts sufficient to constitute a cause of action.

Wherefore the defendant demands that the demurrer herein be sustained and the complaint dismissed with costs.

D. B. LUCEY,
U. S. Attorney and Attorney for Defendant.

74 Ford St., Ogdensburg, St. Lawrence County, N. Y.

35 In United States District Court

[Title omitted.]

Order overruling demurrer

This cause having been regularly brought on for hearing before Hon. Frank Cooper, judge of this court, upon the issue of law joined by the demurrer interposed by the defendant to the complaint of the plaintiff and after hearing Dennis B. Lucey, Esq., United States attorney, for the defendant, and Neile F. Towner, Esq., for the plaintiff, and due deliberation having been had thereon,

Now, on motion of Neile F. Towner, Esq., attorney for the plaintiff, it is

Ordered that the demurrer interposed by the defendant herein be and the same hereby is overruled, and it is further

Ordered that in case the defendant does not interpose an answer within twenty days after the service of a copy of this order upon his attorney that plaintiff is entitled to enter judgment for the relief demanded in the complaint with costs.

Dated, August 9th, 1922.

FRANK COOPER,
U. S. D. J.

36 In United States District Court

[Title omitted.]

Judgment

This cause having been regularly brought on for hearing before Hon. Frank Cooper, judge of this court, upon the issue of law joined by the demurrer interpos'd by the defendant to the complaint of the plaintiff and after hearing Dennis B. Lucey, Esq., United States at-

torney, for the defendant, and Neile F. Towner, Esq., for the plaintiff, and an order having been made that the demurrer interposed by the defendant be overruled and that in case defendant did not interpose an answer within twenty (20) days after the service of a copy of said order upon his attorney, the plaintiff would be entitled to judgment for the relief demanded in the complaint and this defendant not having interposed an answer within twenty (20) days after service of a copy of this order upon his attorney,

Now, on motion of Neile F. Towner, Esq., attorney for the plaintiff, it is

Ordered and adjudged that plaintiff have judgment against
37 the defendant in the sum of thirty thousand ninety dollars and thirty-five cents ($30,090.35) damages and fourteen dollars and thirty-five cents ($14.35) costs and disbursements as taxed by the clerk of this court, amounting in all to thirty thousand one hundred four dollars and seventy cents ($30,104.70), and have execution therefor.

Signed, docketed, and entered, October 25, 1922, 3 p. m.

C. W. Higgison,
Clerk United States District Court.

In United States District Court

[Title omitted.]

Affidavit for judgment

State of New York,
City and County of Albany, ss:

Neile F. Towner, being duly sworn, deposes and says that he is the attorney for the plaintiff herein. That on August 16, 1922, he served a certified copy of the order of this court overruling the demurrer herein dated August 9, 1922, on Hiram C. Todd, Esq., United
States district attorney for the Northern District of New
38 York, attorney for the defendant herein, by delivering a certified copy of said order to Earl Gallup, Esq., assistant United States district attorney, at the office of the said United States district attorney in the post office building, who was in charge of said office during the absence of said United States district attorney.

Deponent further says that more than twenty (20) days has elapsed since the service of said order as aforesaid, and the defendant has not interposed any answer in this action and is in default.

That deponent further says that he has calculated the amount due as demanded in the complaint as follows:

Amount of principal	$21,602.16
With interest as follows to October 24, 1922:	
On $196.58 from June 11, 1915	86.92
On $98.29 from June 29, 1915	43.16
On $4,151.16 from June 30, 1915	1,822.36
On $11,408.99 from June 8, 1916	4,365.84
On $4,672.01 from June 30, 1916	1,770.67
On $1,075.13 from August 16, 1916	399.24
Total	30,090.35
Costs	14.35
Final total	30,104.70

NEILE F. TOWNER.

Sworn to before me this 23rd day of October, 1922.

[SEAL.]

GEO. C. TOBIN,
Notary Public, Albany Co.

39

Opinion

In United States District Court

[Title omitted.]

Appearances: Neile F. Towner, Albany, N. Y., for the plaintiff; Dennis B. Lucey, U. S. attorney, for the defendant.

COOPER, *J.:*

By the will of Anthony N. Brady, deceased, he divided his estate into six equal parts and devised one-sixth of his estate in trust to his executors who were thereby made trustees. The trustees were directed to apply so much of the income and profits from such one-sixth as in their discretion they thought necessary for the support and maintenance of decedent's granddaughter, Marcia Ann Gavit, daughter of the plaintiff herein, and to divide the remainder of the income of such one-sixth not necessary for the support of the granddaughter into two parts, one of said parts to be paid
40 to the plaintiff during his life, but not longer than the infancy of the daughter, Marcia Ann Gavit, and not longer than her natural life should she die before attainting the age of twenty-one years.

During the tax years of 1913–1914–1915, the plaintiff received certain sums of money under the provisions of the Brady will upon which he has been required to pay as normal tax, additional tax and penalties, the sum of $21,602.16. He paid this under protest and appealed to the Commissioner of Internal Revenue, who decided against him, and the plaintiff has now brought this action to recover such amount of taxes with interest.

The question before the court arising upon a demurrer to the complaint is whether or not the moneys so received by the plaintiff under the aforesaid provisions of the Brady will are taxable as income within the meaning of the income tax act of October 3, 1913. (338 Stat. 114.)

The provisions of this act, so far as applicable, are as follows:

"Section 11.

"A. Subdivision 1. That there shall be levied, assessed, collected, and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year *to every citizen* of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, * * *.

Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax)
41 there shall be levied, assessed, and collected upon the net income of every individual an additional income tax (herein referred to as the additional tax) of 1 per centum per annum upon this amount by which the total net income exceeds $20,000 and does not exceed $50,000." (Here follows percentages of additional tax.)

"D. *, * *; guardians, trustees, * * *, and all persons, * * * acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals; * * *.

"E. * * *. All persons, * * * in whatever capacity acting, including * * * trustees acting in any trust capacity, * * * having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, * * * or other fixed or determinable annual gains, profits, and income of another person, exceeding $3,000 for any taxable year, other than dividends on capital stock, or from the net earnings of corporations and joint-stock companies or associations subject to like tax, who are required to make and render a return in behalf of another, as provided herein, to the collector of his, her or its district, are hereby authorized and required to deduct and withhold from such annual gains, profits and income such sum as will be sufficient to pay the normal tax imposed thereon by this section, and shall pay to the officer of the United States Gov-
42 ernment authorized to receive the same; and they are each hereby made personally liable for such tax. * * *

A. Subdivision 2. * * * All the provisions of this section relating to individuals who are chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this subdivision of paragraph A, shall apply to the levy, assessment and collection of the additional tax imposed under this section."

"B. That * * * the net income of a taxable person shall include * * * gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent."

The plaintiff contends that the moneys thus received by him are not income under the provisions of the act of 1913, especially in view of the provisions of subdivision B of such act, and that even if they come under the act of 1913 they are not income within the meaning of the 16th amendment to the Constitution of the United States and that the statute is unconstitutional.

The courts have held that income, within the meaning of the Constitution and the income tax act passed pursuant to the 16th amendment, must be taken in the common understanding of the term. (Eisner v. Macomber, 252 U. S. 189.)

Income as laid down by the United States Supreme Court, within the purview of the Constitution, is defined as:

"* * * the gain derived from capital, from labor, or
43 from both combined, provided it be understood to include profits gained through a sale or conversion of capital assets."

Eisner v. Macomber, 252 U. S. 189, citing, Stratton Ind. v. Howbert, 231 U. S. 399, 415. Doyle v. Mitchell Bros. Co., 247 U. S. 179, 185.

In the same case (Eisner v. Macomber) the relation of capital to income is expressed as follows:

"The fundamental relation of 'capital' to 'income' has been discussed by the economists the former being likened to the tree on or the land, the latter to the fruit or the crop; the former being depicted as a reservoir supplied from springs; the latter as the outlet stream, to be measured by its flow, during a period of time."

Since the moneys received by plaintiff were not income from labor, nor from labor and capital combined, nor from the sale or conversion of capital assets, we have only to do with income received from capital. Income as now considered is, after the severance, separate and apart from the capital; it is as separate and apart from the capital as the fruit from the tree, the crops from the land after severance, or the waters in the outlet stream after passing out of the reservoir. It is something which has grown out of or issued from capital, leaving the capital, unimpaired and intact.

Having these considerations in mind, it can not be said that these moneys received by the plaintiff arose from any capital of his. So far as appears from the pleadings in this case, he had no
44 land, trees, or reservoir to produce crops, fruit, or outlet water—no capital of any kind whatever.

If the income-tax law of 1913, therefore, is intended only to tax the income which is the fruit of the taxpayer's labor, or the income from the taxpayer's capital, in which case he has a present ownership (or at least a vested future interest, meantime receiving the income or the gain from the sale or conversion of the taxpayer's

capital assets) then the money received by the plaintiff is not income as to him because he has not and never will have the slightest ownership, present or future, vested or contingent, in the capital producing this income.

If this is income, therefore, it is the income not of the capital of the plaintiff, but of the capital or a portion of the Brady estate, which capital will never be that of the plaintiff.

There is nothing in the act of 1913 which taxes income which is not the income of the citizen or the individual sought to be taxed. The levy, assessment, and payment is upon the net income of a "*citizen*," section A, subdivision I. "*Individuals*" are chargeable with the normal and the additional income tax, section A, subdivision 2. The return required by section A, subdivision 2, is a *personal* return.

An estate is not a "citizen" nor a "person." There is nothing in the act of 1915 which shows any intent to tax the income of estates as distinguished from the income of a citizen or individual resident of the country. There is in the act no definition of citizens of individuals which makes either of these terms include estates.

45 It is true that section A, subdivision 1, speaks of "income arising or accruing from all sources * * * to every citizen" and section A, subdivision 2, uses the language, "income derived from any source whatever." This must, however, be held to mean moneys which are essentially income and which are income received from the labor or capital or both, or the conversion of the capital assets, of the person sought to be taxed, and to be limited by the provisions of subdivision B.

The act of 1913 in section 1, subdivision B, purports to define the income of a taxable person liable to tax. There is no suggestion in subdivision B of any tax upon the income of estates, as distinguished from the income of individuals. This subdivision B in defining what shall be deemed to be income of a "*taxable person*" provides that the net income of a "*taxable person*" shall include "*income from*, but *not the value of property* acquired by gift, bequest, devise, or descent." This means that there shall be included within the taxable income of a person liable to tax, the income which he shall receive from property acquired by gift, bequest, devise, or descent. It should be construed as if the statute read—"The income of a taxable person shall include the income from property acquired by gift, bequest, devise, or descent, but not the value of the property itself."

The transfer of possession and the beneficial use of property acquired by a person by gift, bequest, devise, or descent is usually delayed by reason of the necessity for operating the legal

46 machinery required to execute the provisions of the law of trusts, probate, and intestacy. Oftimes the property which the person thus receives is withheld for a period of time and he does not get the corpus or capital of the property which he receives by

gift, bequest, devise, or descent, until a long time after the right thereto is created. During all this suspension of absolute ownership and possession of the property thus acquired, interest, or income, accrues. The intent of subdivision B is to tax to the person the income which accrued and is received by him from the property acquired by gift, bequest, devise, or descent and which property has been withheld from him.

There is no suggestion in subdivision B that the income of estates as such, regardless of what disposition is made of the income, shall be taxable and the tax thereon paid by any person, either in his individual right or as fiduciary.

The other provisions of the act relating to fiduciaries, are in entire harmony with this construction. Subdivision 2, paragraph D, requires the guardians, trustees, etc., of persons *who are subject to an income tax because of the amount of income received* from such property acquired by gift, bequest, devise, or descent, make a return of the net income of such persons, subject to this tax, for whom such guardians or trustees act. Subdivision 2, paragraph E, provides that where the income of any person shall exceed three thousand dollars for any taxable year, the guardian, trustee, etc., of such person shall withhold and deduct from the income paid to such person the amount of income tax on such income so paid to such person.

47 The last provisions relating to fiduciaries are machinery to safeguard the Government's obtaining the income tax on the income of persons from property which they acquire by gift, bequest, devise, or descent, which property is temporarily in possession and custody of fiduciaries.

To make these fiduciary provisions and subdivision B applicable and to bring a person thereunder, there must be both income and property received by gift, bequest, devise, or descent, and also the property or capital itself. Unless there is both, there is no income within the meaning of these provisions of the income-tax law and no income to be paid; nor is there any return to be made by the fiduciaries nor any tax to be withheld from the moneys paid to the beneficiary.

Applying this to the case at bar, we must find as to the plaintiff both the income from the property acquired by gift, bequest, devise, or descent and the property itself, within the meaning of the income-tax law of 1913. If these moneys received by the plaintiff from the trustees from this one-sixth portion of the Brady estate are income, where is the property acquired by the plaintiff from the Brady estate; in other words, his capital, either in present possession or right of future possession, from which the income arose? Clearly, there is none. He never gets the property which produces the income. So as to him there is not both the property acquired by gift, bequest, devise, or descent, and the income thereof.

The learned district attorney recognizes and concedes that "income" must be something separate, apart, and distinct from "capital," both belonging to the plaintiff. He argues in his brief
48 that the right to receive the moneys, must, of necessity, be the capital or corpus from which the moneys received by the plaintiff accrued. This contention does not carry conviction, especially in the light of the amendment to the provisions of the act, hereinafter more specifically referred to. Capital, within the intendment of the statute, must be something discernible, tangible, indivisible, and probably immeasurable. Heirs have a right to inherit. That does not make the inheritance income. So, too, an instrument providing for the future transfer of property would give the transferree the right to it, but would not thereby make the transferred property income, because it came from such right.

Moreover, there is nothing fixed, absolute, or certain about the plaintiff's right to receive any moneys in any year under the provisions of the will. If the trustees elect that the whole amount of the income of the one-sixth is necessary for the support of the testator's granddaughter as she grows older and her expenses increase, the plaintiff gets nothing. His right is extinguished. To call such a right property or capital or the equivalent thereof within the provisions of the act of 1913 would be unreasonable.

Further consideration of the character or legal status of the moneys received by plaintiff may be helpful. If the will had provided that the income of this one-sixth of the Brady estate, during the first year after his death, should be paid to the plaintiff and the income thereafter appropriated to the support of his granddaughter, so far as necessary, and the balance accumulated for her benefit, would anyone contend that the payment to the plain-
49 tiff in the one year was income within the meaning of the act of 1913? If the testator in his will had provided for such payment during the first two years after his death, would any one contend that the moneys paid to the plaintiff during the two years was income within the meaning of the act of 1913?

Would it not be clear that this was property acquired by bequest or devise by the plaintiff, the value of which is provided by subdivision B of the act of 1913 to be not taxable as income? Does the fact that the plaintiff received a portion of the income of this one-sixth for three years under the act of 1913, and may receive it longer, change its character from capital to income under this act? Under no circumstances can it last longer than fifteen years, the granddaughter being six years of age. It may cease immediately.

From the foregoing it must be determined that there is no provision of the income tax law of 1913 by which it can be held that the moneys received by plaintiff during these years 1913, 1914, 1915 are income and taxable. While the moneys received by plaintiff are income as to the estate, they are not income as to the plaintiff. As to him, they are the property acquired by bequest or devise and therefore not taxable.

It was not until 1916 that any provision was made in the income tax act for a tax upon the income of estates as well as a tax upon the income of persons. By the amendment of 1916 it was provided for the first time that the income of estates or of any kind of prop'rt/y held in trust should be taxed to the estates. Merchants' Loan and Trust Co. v. Smeitanks, 254 U. S.—(March 28, 1921.)

50 The Congress, while making this amendment, also eliminated from the income tax law that provision of subdivision B in the act of 1913 which provided that an income tax should be levied upon the income received by persons from property acquired by gift, bequest, devise, or descent, but not upon the property itself.

It may then be presumed in the light of this amendment that the legislative intent in 1916 was to cover the defect, if it may be termed such, and to change the statute to include cases similar to the one in question not before included. Its insertion at least indicates that Congress at least was doubtful whether the previous act included income of estates. United States v. Field, 254 U. S.—(February 28, 1921.) United States v. Bashaw, 50 Fed. 749, 754.

In view of this holding that the moneys received by the plaintiff are not income within the meaning of the act of 1913, it is not necessary to pass upon the constitutionality so far as respects this plaintiff.

The demurrer is overruled.

In United States District Court

Writ of error

To the honorable Judge of the District Court of the United States for the Northern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a cause which is in the said District Court before you, or some of you, between E. Palmer Gavit, plaintiff,

51 and Roscoe Irwin, collector of internal revenue for the fourteenth district of New York, defendant, manifest error has happened to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any, should be duly corrected and full, speedy justice done to the parties aforesaid in this behalf, do command, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with the things concerning the same to the United States Circuit Court of Appeals for the S'cond Circuit, together with this writ, so that you have the same at the post-office building in the city of New York, in said circuit, on the 29th day of March, 1923, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the errors, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable William Howard Taft, Chief Justice of United States, this 27th day of February, A. D. 1923, and in the 148th year of the independence of the United States.

C. W. HIGGISON,
Clerk.

Allowed:
FRANK COOPER,
U. S. District Judge.

52 For United States District Court

(Title omitted.)

Petition for writ of error

Now comes the defendant, Roscoe Irwin, by Oliver D. Burden, United States attorney for the Northern District of New York, his attorney, and says that on the 25th day of October, 1922, this court entered judgment herein against this defendant in the sum of thirty thousand one hundred four and 70-100 dollars ($30,104.70), in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more fully appear from the assignment of errors which is filed with the petition.

Wherefore defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Second Circuit for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals aforesaid.

ROSCOE IRWIN,
Defendant.
By OLIVER D. BURDEN,
U. S. Attorney, Attorney for Defendant.

53 (Citation in usual form omitted in printing.)

54 In United States District Court

(Title omitted.)

Assignment of errors

Roscoe Irwin, defendant in the above-entitled cause, by Oliver D. Burden, United States attorney for the Northern District of New York, his attorney, in connection with his petition for writ of error, makes the following assignment of errors, which he alleges occurred in said cause:

1st. The District Court erred in holding that the payments received by the plaintiff from the trust estate created by the will of Anthony N. Brady were not taxable income within the meaning of the income tax act of October 3, 1913.

2nd. The District Court erred in holding that the payments received by the plaintiff from the trust estate created by the will of

Anthony N. Brady were a part of a bequest from Anthony N. Brady to the plaintiff and not income from the bequest.

55 3rd. The District Court erred in holding that the payments received by the plaintiff from the trust created by the will of Anthony N. Brady were capital and not income within the meaning of the sixteenth amendment to the Constitution of the United States and the income tax act of October 3, 1913.

4th. The District Court erred in overruling defendant's demurrer to the complaint.

ROSCOE IRWIN,
Defendant.
By OLIVER D. BURDEN,
U. S. Attorney, Attorney for the Defendant.

In United States District Court

(Title omitted.)

Clerk's certificate

I, C. W. Higgison, clerk of the District Court of the United States of America, for the Northern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

56 In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Utica, in the Northern District of New York, this 1st day of June, in the year of our Lord one thousand nine hundred and twenty-three, and of the independence of the said United States the one hundred and forty-eighth.

[SEAL.] (Signed) C. W. HIGGISON,
Clerk.

57 In United States Circuit Court of Appeals for the Second Circuit

No. 70. October Term, 1923

Argued November 13, 1923. Decided December 10, 1923

ROSCOE IRWIN, COLLECTOR OF INTERNAL REVENUE for the 14th district of New York, plaintiff in error v. E. PALMER GAVIT, DEFENDANT IN ERROR	In error to the District Court of the United States for the Northern District of New York.

Opinion

Before ROGERS, MANTON, and MAYER, *Circuit Judges.*

Writ of error to the United States District Court for the Northern District of New York, action by E. Palmer Gavit, plaintiff, against Roscoe Irwin, collector of Internal revenue for the fourteenth dis-

trict of New York, defendant, to recover income tax and penalties assessed against his income under act of Congress of October 3, 1913, for the years 1913, 1914, and 1915, which was paid by him under protest. Judgment for plaintiff. Defendant appeals. Affirmed

58 Oliver D. Burden, Esq., United States District Attorney, for plaintiff in error.

Neile F. Towner, Esq., attorney for defendant in error.

MANTON, *Circuit Judge*:

The complaint sets forth in separate causes of action, claims for taxes and penalties assessed and paid under the 1913, 1914, and 1915 income tax laws. The total amount is $21,602.16. Judgment was demanded for this amount with interest and costs. The plaintiff in error demurred on the ground that the complaint failed to state facts sufficient to constitute a cause of action. This demurrer was overruled and judgment entered as demanded in the complaint.

One Anthony N. Brady died leaving a will which provided, among other things, as follows:

"All the rest, residue and remainder of the real and personal property of which I may die, seized and possessed, I direct my executors and trustees to divide into six equal parts and I give, devise, and bequeath the same as follows:

* * * * * * *

"One part, to my executors and trustees, in trust, nevertheless, for the following uses and purposes, to wit: To collect and receive the rents, income, and profits thereof and after paying all necessary expenses to dispose of the net rents, income, and profits thereof as follows: I direct my executors and trustees to apply so much of said net rents, income, and profits as they, in the exercise of their absolute discretion, shall deem proper for the maintenance, education, and support during her minority, of my granddaughter,

59 Marcia Ann Gavit, and I direct my executors and trustees in fixing the amount of said allowance to consider the station in life of my said granddaughter, my desire being that she shall be amply and liberally provided for in every way. All income to be applied to the maintenance, education, and support of my said granddaughter and may be either so applied by my executors and trustees directly, or may in their discretion be paid by them to the guardian of the person of said minor, and the receipt of such guardian shall be full and complete discharge to them for all moneys so paid by them to such guardian. The balance of said net rents, income, and profits shall be divided into two equal parts: One of the said parts shall be paid to my son-in-law, Erastus Palmer Gavit, in equal quarterly payments during his life. The other moiety shall be accumulated for the benefit of my said granddaughter. Upon the death of my said granddaughter before she attains her majority, whether her father be then living or not, I give, devise, and bequeath the capital of said trust estate to her issue in equal shares, per stirpes, and if she leaves no issue, whether her father be then living or not, I

give, devise, and bequeath said capital to my issue, share and share alike, per stirpes. When my granddaughter attains the age of twenty-one years, whether her father be then living or not, and whether she then has living issue or not, I direct that said trust shall cease, and I give, devise, and bequeath the capital of said trust estate to my said granddaughter, her heirs and assigns forever."

Under this provision of the will, the defendant in error was entitled to share in the balance of the net rents, income, and profits which was to be divided into two equal parts, one of the said parts to be paid to the defendant in error in equal quarter yearly payments during his life. The plaintiff in error treated the moneys
60 so received during the years 1913, 1914, and 1915 as income under the income tax law, whereas the claim of the defendant in error is that it was a legacy and hence not taxable. The act of October 3, 1913 (38 Stat., 114–116) which is applicable is as follows:

"A. Subdivision 1. That there shall be levied, assessed, collected, and paid annually upon the entire net income arising and accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned, and of every business, trade, or profession carried on in the United States by persons residing elsewhere.

"Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of every individual an additional income tax (herein referred to as the additional tax) or 1 per centum upon the amount by which the total net income exceeds $20,000 and does not exceed $50,000, and 2 per centum per annum upon the amount by which the total net income exceeds $50,000 and does not exceed $75,000, 3 per centum per annum upon the amount by which the total net income exceeds $75,000 and does not exceed $100,000, 4 per centum per annum upon the amount by which the total net income exceeds $100,000 and does not exceed $250,000, 5 per centum per annum upon the amount by which the total net income exceeds $250,000 and does not exceed $500,-
61 000, and 6 per centum per annum upon the amount by which the total net income exceeds $500,000. All the provisions of this section relating to individuals who are to be chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this subdivision of paragraph A, shall apply to the levy, assessment, and collection of the additional tax imposed under this section.

"Every person subject to this additional tax shall, for the purpose of its assessment, and collection, make a personal return of his total

net income from all sources, corporate or otherwise, for the preceding calendar year, under rules and regulations to be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury.

"B. That subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and incomes derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rents, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent."

Under the provisions of this will, the defendant in error received a certain portion of the increase of the estate of the testator for a definite period, that is, until the testator's gronddaughter,
62 Marcia Ann Gavit, who was the daughter of the defendant in error, attained the age of twenty-one years, at which time the entire one-sixth part of the trust estate bequeathed under this portion of the will was given to her absolutely. The gift to the defendant in error was further limited by the life of his daughter, for the will provided that if she died prior to attaining the age of twenty-one, defendant in error was to receive no further sums whatsoever under the will and the entire trust estate went to the issue of his daughter, if any, otherwise to the issue of the testator.

A bequest is a conditional or unconditional voluntary disposition of personal property by will. (Merriam v. United States, 282 Fed. 851, aff'd. Supreme Court Nov. 12, 1923.) In the Merriam case, where the 1913 income tax, subdivision (b) was considered, providing for a tax upon gains, profits, and income derived from or

> "growing out of the ownership or use of or interest in real or personal property, also from interest, rents, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever including the income from but not the value or property acquired by gift, bequest, devise or descent,"

it has held to indicate an intention on the part of Congress to make the words "acquired by gift, bequest, devise, or descent" an exception in the taxing act, rather than an exemption. The words of the statute used in the exemption clause of the act, provide that income shall include all gains derived from compensation from the various sources except property acquired by request or devise. Undoubtedly, the testator intended a legacy to the defendant in error. The gift received by the defendant in error is measured by the increase of
63 the corpus of the estate, but this does not change the status of his position and what he receives continues to be a legacy or be-

quest and he is still a legatee. But it is urged by the plaintiff in error that instead of receiving a definite sum or a definite portion of the corpus of the estate, the gift ceased to become a legacy and became income because it was paid as received from the earnings of the corpus of the trust fund. A sum of money invested under the terms of a will, the income of which is paid to the testator's son for life and at his death, the principal to a third party, is a legacy under the New York law. (In the Matter of Stanfield, 135 N. Y. 292.) So amounts paid periodically to a beneficiary instead of in a lump sum, have been held to be legacies when so paid. (United States v. Fidelity Trust Co., 222 U. S. 158.) Amounts received by beneficiaries out of the increase of the corpus of the testator's estate, are gifts or bequests. (Westus v. Union Trust Co., 154 Fed. 795; Lynch v. Union Trust Co., 164 Fed. 161.) Income has been defined by the Supreme Court as a gain derived from capital, from labor or from both combined provided it is understood to include profit or gain through a sale or conversion of capital assets. (Eisner v. Macomber, 252 U. S. 189; Doyle, etc., v. Mitchell Bros. Co., 247 U. S. 179.) If this was solely a gift from the testator which came to him through a period of not to exceed fifteen years (since his daughter was but six years of age), the fact that the amount was not definitely known and was not measured by a different method that a fixed share of the corpus of the estate, can not alter its character as a gift or bequest. Nor is Smietanka v. First Trust & Savings Bank (257 U. S. 602) in conflict with this statement. There it was provided that income from a trust fund for the benefit of unborn and unascertained beneficiaries, was not made taxable by any language in the income tax of October 3, 1913. It is said:

64 "There was nowhere in the act a payment required of a fiduciary of a tax upon the income of the estate or trust property, the income from which he collects, except as it is to enure to the benefit of a person or an individual from whose income he is authorized and required to deduct the normal tax thereon."

That action was brought agains unborn persons so that whether or not the amount received was income as to them was not decided. The trustees were held entitled to recover the entire income tax, both normal and supertax, which they had paid.

We are satisfied that the bequest to the defendant in error was not income under the act of 1913 and under section 2 (b) this sum is expressly excepted in determining what his income is for the purpose of taxation as the act provides that net income of a taxable person shall not include the value of property acquired by gift, bequest, devise, or descent. (Merriam v. United States, supra.) What in its nature is not income can not be made such merely by Congress calling it such. (Towne v. Eisner, 245 U. S. 425.) Under the act of October 3, 1913, the levy, assessment, and payment is upon the net income of any person residing in the United States, though not a citizen thereof under section (a), subdivision 1. And under subdivision 2, "individuals" are charged with the normal tax and every "person" subject to additional tax must make a "personal" return and the net income of a taxable "person" is defined in sec-

tion (b). There is nothing in the act which makes an estate a "citizen" or a "person" and the income of an estate is therefore not taxable. The 1916 act indicated a congressional intention to levy and impose an income tax upon an estate (39 Stat. 753; §2, act of 1916; 39 Stat. 756). The fact that the prior act is amended by the 1916 enactment demonstrates the intent to change the
65 pre-existing law and the presumption is that it was intended to change the statute in all particulars touching which we find a material change in the language of the act. (United States v. Bashaw, 50 Fed. 752; reversed in the Supreme Court on other grounds, 152 U. S. 456.) The 1916 act omits the provision in the act of 1913 which in defining income excludes the "value of property acquired by gift, bequest, devise, or descent" (act of 1916, chap. 463, §3) and it makes a new provision for returns by trustees (§8) and provides for an estate tax (§200), indicating that the latter act enlarged the scope of the internal revenue law. It is argued here that because paragraphs D and E, subdivision 2, of the act of 1913, provide that a guardian or trustee withhold a sum sufficient to pay the normal tax imposed under the act, that the income from the trust fund such as here becomes taxable. But these provisions were undoubtedly inserted to safeguard the Government in obtaining the income of persons from property which they have by gift, bequest, devise, or descent, where the property is temporarily in the possession of the fiduciaries. Oftentimes the beneficiary does not obtain the corpus or capital of the property which he received under the will until some some time after the right thereto is created. During this period, income accrues and the intent of the law is that the trustee shall render a return and pay the normal tax of persons subject to the tax. Here, the defendant in error is not subject to the tax and received no part of the corpus of the estate so that the sections referred to do not apply. In Merchants Loan & Trust Co. v. Smietanka (255 U. S. 509) in construing the act of 1916, it was held that by provisions of the income tax law of that year, a testamentary trustee is a taxable person indicating that it was only under such section that such trust became taxable. And again in Smietanka v. First Trust & Savings Bank (267 U. S. 602) the court said:
66 "In the act of 1913, it would have been easy to require a trustee to pay an income tax on income received by him for unborn beneficiaries or for the trust or the estate, but Congress did not do so. In the next act it did so. We cannot supply the omission in the earlier act."

While the moneys received by the defendant in error are income as to the estate, they are not income as to the defendant in error. We think that he acquired the moneys by bequest or devise and they are not taxable.

Judgment affirmed.

67–68 In United States Circuit Court of Appeals

(Title omitted.)

Judgment, Dec. 17, 1923

Error to the District Court of the United States for the Northern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Northern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

H. W. R.
M. T. M.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

69 In United States Circuit Court of Appeals

Clerk's certificate

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 68, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Roscoe Irwin as collector, etc., plaintiff in error, against E. Palmer Gavit, defendant in error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 1st day of March in the year of our Lord one thousand nine hundred and twenty-four and of the independence of the said United States the one hundred and forty-eighth.

WM. PARKIN,
Clerk.

70 Supreme Court of the United States

Order granting petition for certiorari, April 14, 1924

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

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